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TAXATION AND ITS EFFECTS ON CONVEYANCING

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at the first Legal Convention of the Law Society of Western Australia, held at Bunbury, W.A., on 26-27th July, 1958.

In every age there seems to have been a few particular Statutes dear to the heart of conveyancers. The lawyers of the past had their Statute of Uses and Statute of Wills, Settled Land Act and Real Property Acts, and, of course, over the last century we have had the Torrens Title Acts and Companies Acts.

Now here, half way through the 20th Century, it is interesting to speculate on which of the many Acts on the Statute Book most affects conveyancing practice. Whether all would agree that the Income Tax Assessment Act takes pride of place in this regard may be doubtful, but the impact of tax legislation (and in this I include not only income tax but also death duties and gift duty) is so constantly felt on such a variety of conveyancing matters that no lawyer these days can be regarded as a competent practitioner without a thorough knowledge of the effect of tax on the documents he is called on to draft or interpret.

Well known instances where tax is generated are the covenant in the lease that the lessee will erect improvements on the demised premises, the provision in a contract of sale of a business making the goodwill taxable or a stipulation including goodwill and a lease in the one consideration with the likely effect of the consideration being treated wholly or partly as a premium. Again, the taxation benefits of a family partnership may well be lost by any provision in a partnership deed limiting operations on the partnership banking account to one or more of the partners to the exclusion of others. Then again, in drafting a superannuation trust deed care is necessary to ensure that the benefits to the employees are fully secured within the meaning of s. 66 of the Income Tax Assessment Act, otherwise the employer may be refused his contributions as a deduction for income tax. On the transfer of a farming or other property, say from father to son, should the father take an annuity charge and be taxable on it as income, allowing the son to take the deduction; or should the consideration be instalments of purchase money? In husband and wife wills, would the family position be satisfactory and double death duties avoided if joint tenancies were converted to tenancies in common, each leaving the other a life estate?

These are only some examples of the effect of taxation on conveyancing. Most practitioners will be able to think of many more and our country colleagues as well as we from the city must always have in mind the dreadful consequences of ignoring ss. 36, 36A and 59 of the Act in regard to disposals of livestock and plant either on a sale or gift or on the formation of a partnership or limited company.

All these changes in the practice of conveyancing stem, of course, from public demand consequent on high and steeply graduated rates of income tax and death duties, combined with monetary inflation and an expanding national economy. Before World War II income tax was not a serious worry to many people, nor were death duties in the higher brackets attracting many customers. In those days lawyers gave more thought to stamp duties than income tax, and then, of course, we had no gift duty legislation to complicate attempts to dispose of property during life. But let us look at things as we find them at present. More and more of our clients are climbing into higher income tax and death duty brackets and seek our aid not only to minimize income tax during their lifetime but, with a view to reducing death duties, wish also to, at one and the same time, dispose of their assets to their families during life but cling firmly to the control and enjoyment of those assets as long as possible.

These things present difficult questions and all of us have to face up to these problems if we are to render that service to our clients which they are entitled to expect from the profession. To put the problem bluntly, the client as a rule wants to have his cake and eat it too, or perhaps it might be better to say that he wants to eat his cake and let his family keep it. Also in the matter of his income tax he wants to arrange matters so that in preparing his income tax return, he is entitled, like sunbathers on the beach, to take off as much as possible within the law. He usually has a business or a farm or station, or perhaps he draws a salary but has a property income. How best can we serve these clients?

Despite the criticism made by Taxation Commissioners from time to time, it is still good law that the subject is entitled to so arrange his affairs as to attract the minimum demands of the revenue authorities, so long as he does so within the law. Tax avoidance is a very different thing from tax evasion, although the lawyer explaining to his lay client the niceties of the difference is often greeted with a look of incredulity as if he were a conjurer pulling very much alive rabbits out of apparently empty hats.

Income tax and death duty legislation has virtually killed off the old style form of family settlement. Section 102 of the Income Tax Assessment Act renders nugatory any attempt, by means of a trust, to split income between a settlor's children who are unmarried minors; nor will this section, with its provision denying any income tax concession to revocable trusts, allow any strings to be kept on the property so as to return a beneficial interest to the settlor. But even if a settlor is prepared to face up, virtually, to paying the whole of the tax on the income of the settled property as if it were his own, he is still discouraged by s. 74 of the *Administration Act* 1903-1956, which makes dutiable any gift made at any time unless possession and enjoyment have been assumed by the donee forthwith and thenceforward retained to the entire exclusion of the donor, and without reservation of any benefit to the donor.

It might be noted that straight out gifts by parents to their children who are unmarried minors are not contaminated by either s. 102 of the Income Tax Assessment Act or s. 74 of the Administration Act. However, these gifts carry the disadvantage, apart from gift duty, that to be clear of death duties the donor must survive the statutory period of one year for State Probate Duty and three years for Federal Estate Duty, although in the latter case the Taxation Department must give credit for any gift duty paid.

Then again, the usual form of old style family settlement will probably run foul of s. 82 of the Administration Act and be dutiable not only as a conveyance initially, but also as a settlement later on when some of the trusts or dispositions take effect on the death of the settlor or some other person.

How then is the conveyancer to satisfy his client's requirements so as to minimize taxes and duties and at the same time ensure that the client retains control and has some guarantee of continuity of benefit within the family?

Different practitioners may have different solutions to this problem, but I propose here to deal with three conveyancing methods which offer a measure of relief. I refer to discretionary trusts, family partnerships and family investment companies.

Discretionary trusts

Settlements under which parents settled property on trustees upon discretionary trusts as to application of capital or income, or both, were formerly a popular method of protecting prodigal sons from the effects of their own recklessness, and protecting attractive daughters from

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fortune-hunting husbands. The form of these settlements has changed over the years, but basically it is the same as that to be found in the earlier editions of conveyancing precedents. In essence, a discretionary settlement is a settlement of property by a settlor on trustees upon trust to pay the income, and if desired also the capital, to such one or more specified beneficiaries as they think fit. To be effective for death duty purposes the settlor must not only survive the statutory periods of one and three years, but also completely exclude himself from any possible benefit. Further the settlement must not contain any trusts to take effect on or after the death of the settlor or any other person otherwise it will be caught for duty as a "settlement" under s. 82 of the Administration Act.

These discretionary trusts have been given some recognition by the Income Tax Assessment Act which, by s. 101, provides that any beneficiary receiving income under a discretionary trust shall be deemed presently entitled. When read with s. 102, it would seem that if under a discretionary trust the trustees in their discretion pay to a child of the settlor who is an unmarried minor, then the whole object is liable to be defeated because, probably, tax would be payable at the rate applicable as if the income belonged to the settlor. The discretionary trust seems, therefore, of little use as a means of presently dividing a father's income between his unmarried children while they are minors. It is at its best when made by a grandparent for the benefit of grandchildren, but for many people this is too long to wait and, of course, it only provides an answer in limited cases.

It has, however, two advantages:

(1) The settlor's estate is diminished by the extent of the disposition both for income tax and death duties, and

(2) The income of the trust estate can be accumulated and, as no person need be presently entitled to it, tax will be levied on it separately against the trustees.

On the question of continuity the perpetuity rule applies, but the common period and one which is long enough for most purposes is "until the expiration of 21 years after the death of the last survivor of the issue now living of His late Majesty King George V".

Before leaving the subject of settlements, it is interesting to note that the Full Court of the High Court has found another chink in the Commissioner of Taxation's armour in regard to s. 102. In *Hobbs* v. *Federal Commissioner of Taxation* (1957), 6 A.I.T.R. 490, the Full Court

held unanimously that s. 102 relating to trusts for unmarried minors had no application where the minor was only contingently entitled.

In that case certain shares in a company were settled by a mother on trustees upon trust for her three children on attaining 25 years or marrying under that age. In the event of the death of a child unmarried before attaining 25 years then the contingent share of the deceased child was to be equally divided between the surviving children on the same trusts, and if no child attained 25 years or married under that age then the trustees were to hold the trust estate for the settlor's husband if then living, otherwise, upon the trusts appointed by the husband's will. Under the terms of the trust instrument the trustees had discretionary power to apply income and up to one-half of the capital of a child's presumptive share for maintenance and benefit of the child. The trustees had accumulated all the income under the trust. The Full Court held that to come within s. 102 (1) (b) of the Act it must be possible to say of the income (a) that it must in the year of income be payable to or accumulated for or applicable for the child or children and (b) that to deal with it otherwise is not within the trust.

It is therefore possible for a settlor, without risk of invoking s. 102, to settle property on his children, and for the income to be accumulated for their benefit provided the settlement makes it clear that the children's interests are contingent on a certain event.

Family partnership

I turn now to the family partnership, which I think all will agree is by far the most popular arrangement for the self-employed person, whether he is a farmer or a business man. It is extremely flexible and can take many forms according to the wishes of the parties. It can be a simple income partnership with the father owning all the initial capital and the rest of the family merely sharing in the profits; or it can be a full-scale affair bringing in the land or business premises together with the stock and plant.

An intermediate arrangement is where the land is left in the father's ownership and the stock and plant are brought in as partnership assets. It all depends on how far the father is prepared to go and how much he is prepared to pay in duties to set up his plan.

If he brings in the land he is setting the stage for eventual relief from a degree of death duties but he must face up to paying *ad valorem* stamp duty at 1% plus, in the case of a gift, 3% gift duty. A transfer by

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way of sale will avoid gift duty even though payment is not presently made, but the debt will be part of his estate unless released or paid off before his death.

Releases of £2,000 every 18 months will, of course, escape gift duty. In any event the transfer must eventually save death duties on any increase in value of the land as the result of capital increment or further improvements.

As regards stock and plant, I have already mentioned ss. 36, 36A and 59 of the Income Tax Assessment Act. Provided the plant is brought in at depreciated tax values there is no problem. On the question of stock it is necessary, of course, to watch s. 36A, under which the disposition to the partnership is not taxable on the difference between the tax value and the market value provided the original owner of the stock has at least a 25% interest in the partnership which acquires the stock from him. In such a case the partnership can elect the opening value of the stock for tax purposes and so escape the tax which otherwise would be payable on the disposition.

Assume a family of husband, wife and three children. What are the income tax advantages of a family partnership over a sole trader? These are the figures after allowing for concessional deductions in the case of the sole trader, and the loss of them in the case of the partnership:

Income earned £3,000.

Sole trader pays £628 or 20.9%.
Partnership pays £128 or 4.2%.

Income earned £5,000.

Sole trader pays £1,540 or 30.8%.
Partnership pays £374 or 7.4%.

Income earned £10,000.

Sole trader pays £4,429 or 44.2%.

Partnership pays £1,388 or 13.8%.

With such substantial differences in tax it is hardly surprising, therefore, that so many of the farming community and business men have formed these family partnerships. Over the past decade the increase in the number of family partnerships has been enormous and there must be few practitioners who have not been engaged in this work to some extent.

Since the *Coldstream Case* in 1943 in the High Court established beyond doubt the legality of the family partnership, there can be no objection to the senior partner retaining control of the partnership.

As a result of this case a family partnership cannot be challenged by the Taxation Department unless, in the terms of s. 94 of the Act, the partnership is so constituted

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or controlled or its operations so conducted that (a) one of the partners has not the real and effective control and disposal of his share of the partnership income and (b) another partner (or partners) has the real and effective control of that share. It is not sufficient that the first condition be fulfilled if the second condition is not also satisfied. Further, there must be the whole control of the whole of the share by the dominant partner before s. 94 can be successfully invoked.

In the *Coldstream Case,* reported in 68 C.L.R. 391, by the terms of a deed of partnership between C., his wife and two daughters, it was provided, *inter alia,* that C. should have the sole management and control of the business; that each partner should be entitled to an equal share of the profits; that the wife and daughters should allow 70% of their shares of the net income of the partnership to be credited to their capital accounts and the remaining 30% to their drawing accounts; that the wife and daughters should not be entitled to make withdrawals from their drawing accounts except with the consent of C.; and that C. should be entitled at any time to sell or dispose of the partnership business upon such terms and conditions as he thought proper, and should stand possessed of the purchase moneys arising therefrom upon certain trusts.

It was held by LATHAM, C.J., that although the wife and daughters had "not the real and effective control and disposal" of their shares of the net income of the partnership, within the meaning of s. 94 (1) of the Income Tax Assessment Act, C. had not "the real and effective control" of their shares within the meaning of the section; therefore the partnership was not taxable under s. 94.

As far as the Taxation Department is concerned therefore, the only requirement of a family partnership for tax purposes is that each partner should have control of some part of his share of the income.

A family partnership generally speaking works greater tax savings than the family company, but it has certain disadvantages which cannot be overlooked. Firstly, the death of a partner may seriously embarrass the firm unless the wills of the partners have been co-ordinated. Secondly, the continuity of the partnership may be interrupted by the withdrawal of a partner.

Family investment companies

I turn now to family investment companies, a form of family tax planning which has become popular over the past few years.

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The main advantage of a limited company is that being a legal entity separate from its shareholders it never dies, nor does the death of a shareholder interrupt its continuity. It has also the advantage of limited liability, but with a family concern this usually is only of academic interest. Another advantage is that withdrawal on the part of a shareholder can be made virtually impossible against the will of the senior shareholders.

Income tax is higher than with a partnership because primary company tax is payable on profits, and the balance over the permitted retention allowance must be distributed as dividends on which the shareholders will pay personal income tax. However, if the assets to be transferred to the company consist of shares in other companies then no company tax will be payable because, in essence, one company does not have to pay tax on dividends received from another company.

The usual set up of a family investment company is as follows. The memorandum has the usual object clauses of an investment company. The articles provide in the simplest cases for two types of shares. A very small number of "A" class shares, which carry voting power equal to three-quarters of all issued shares plus one. These will be held by the person who is to control the company and he will also be sole governing director with full powers of the Board, power to appoint and dismiss other directors at his pleasure and to appoint a successor as governing director by deed or by his will. The rest of the shares will be "B" class shares which will have virtually no voting rights but which will represent the majority of the capital of the company. The articles will contain what might be called a differential dividend article enabling dividends to be declared on either class of shares to the exclusion of the other class.

Assume a father with assets consisting of shares in public companies and rent producing property of a value of £40,000 returning an income of £4,000 per annum. He has other income from directors' fees, etc., of £1,000 per annum. His total income tax on £5,000 is £1,700. On £1,000 it would be a mere £106. He has reached the stage in life where he wishes to start passing his capital assets on for the benefit of his family of five children, yet at the same time he needs some of the income and, at all costs, he is unwilling to give up control. He decides to arrange his affairs by means of a family investment company. Let us look at the mechanics of this and see how it can be done. The first thing is to form a proprietary company with a capital of, say, £50,000 in £1 shares, comprising 500 "A" shares and the remainder "B" shares. The father,

by contract of sale, sells his assets to the company at the market value, namely £40,000, on a small deposit and the balance payable on demand free of interest.

He takes up the 500 "A" shares fully paid	=	£500. 0 .0
The five children equally between them take up, say, 44,500 "B" shares paid up to 6d. each	=	£1,112.10.0
Total	=	£1,612.10.0

This will be the amount of the deposit in the contract and the gift of £1,112.10.0 to the children to pay for their shares does not even attract a gift duty return. The company receives a cheque for £1,612.0.0 and pays out a cheque for the same amount to the father in payment to the father of the deposit under the contract.

At this stage the father has disposed of his assets but is owed the price of £40,000, less the deposit. Assuming there are no directors' fees or other expenses, the company will receive the income of £4,000 per annum and will pay primary company tax at the rate of 4/6d. in the £ on so much of the income as does not consist of dividends received from other companies; for example, if the income is £2,000 from rents and £2,000 from dividends, then company tax will only be payable on £2,000 at 4/6d. in the £, a total of £450. Being a private company, a certain proportion of the income must be distributed by way of dividends if the company is not to be caught for undistributed profits tax at the rate of 10/- in the £. The amount which a company can retain as undistributed profits not subject to tax is calculated by reference to s. 105B of the Income Tax Assessment Act, as follows:

50% of the first £1,000 of income
40% of the next £1,000 " "
35% " " " " " "
30% " " " " " "
25% " " " " " "

However, in the case of income from property (except dividends from other private companies) the retention allowance is only 10%. If all the income of a private company is comprised of dividends in other private companies then there is no retention allowance at all (s. 105B (f)).

On the income of £4,000 the company could, therefore, if it wishes, retain and accumulate £400 per annum. Assume, however, that the company decides to make a full distribution of £4,000 per annum. The father, as governing director, uses the differential dividend article to declare a

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dividend on the "B" shares only, so that each of the five children becomes entitled to a dividend of £800. He then, as Governing Director, makes a call on the "B" shares of an amount sufficient to absorb the £4,000, less company tax, back into the company. Having done this, the company has a cash balance at the bank which it can pay to the father in reduction of the balance of purchase price of the assets it bought from him. He therefore receives this money as capital and, of course, free of income tax. The resultant tax position would be as follows:

Before forming the company the father pays tax on £5,000		= £1,700
After the company is formed —		
The father pays tax on £1,000	= £106	
The company pays tax at 4/6d. in the £ on £2,000	= £450	
Five children each pay tax on £800 = 5 x £70	= £350	
	£906	

The tax saving is therefore approximately £800 per annum. The father has disposed of the assets. On his death his 500 shares will not be worth very much and can be disregarded for all practical purposes. His only risk is that he may die leaving part of the debt owing by the company as an asset of his estate. He can, of course, reduce this risk by executing releases of £2,000 every 18 months if he wishes, but in any event the extent of his estate is fixed and cannot be materially affected by any capital appreciation of the assets now vested in the company. If, at any later time in life, he is short of funds, he can use the differential dividend article to divert all dividends to himself to the exclusion of the children.

This is basically the plan for most family investment companies. There can be, of course, variations and refinements in particular cases. Instead of "A" and "B" class shares there could be preference and ordinary shares, the preference shares having a preferred fixed dividend and all the voting rights but no participation in assets on winding up except as to return of capital. The ordinary shares would be normal ordinary shares but with no voting rights. Then again, the shares held by each child can be of a different class so that the differential dividend article can be used to distribute dividends unevenly or, if desired on some occasions, one or more children may be excluded from dividends. Another refinement, but one probably not worth while except in major cases, is to incorporate the family investment company in Canberra and for the father to enter into the contract in Canberra and to leave the

instrument there. While the Administration Act continues to levy probate duty on personal property according to the *lex situs* and not according to the law of the domicil, this is an effective way of avoiding State probate duty on the debt due to the father's estate, because in such a case the debtor, and also the specialty, are situated outside Western Australia, consequently the debt, as an asset, is also situated outside Western Australia. As there is only Federal Estate Duty payable in Canberra all State death duties are avoided.

These family investment companies are at their best when the assets are shares in other companies. In such cases the family company has all the advantages and none of the disadvantages of a family partnership, and is no more expensive from the point of view of income tax because no company tax is payable.

It may be argued that the greatest benefits from partitioning of income between members of the family is reserved for those with the largest families. That is true, but for those with small families there is another solution besides the obvious one of increasing the family. It is possible for one or more trusts to be set up by friends or relatives with small sums of money in the beginning. Each trust instrument gives power to invest in the contributing shares of the family investment company. If under these trusts the beneficiary is not presently entitled, each trust will be separately assessed in respect of dividends on shares taken up. By this means partitioning of income is not restricted to the actual number of children in the family.

To illustrate this, let us assume that the client, with a wife and two children, has income from salary and directors' fees, etc., of £3,000 per annum. In addition, he owns shares in companies from which he draws an income from dividends of £1,500 per annum. After allowing for concessional deductions for the wife and two children, his tax on £4,500 is £1,313, whereas the tax on £3,000 would be £648, so that the extra £1,500 costs in tax £665 per annum. He sets up a family investment company to hold the shares. Two relatives or friends set up two small trusts for each child under which the children are not presently entitled.

Assuming the shares in the family investment company are taken up equally by the wife, the two children and the four trusts, the income from the original dividends will be split between seven taxpayers. The income of each will then be £211 p.a. and the tax on each £3, or £21 in all. By this arrangement the family unit will be better off to the extent of approximately £539 p.a. in tax savings after allowing for the loss of the concessional deductions.

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We must always, however, keep in mind s. 260 of the Income Tax Assessment Act, which purports to make void, as against the Commissioner, agreements or arrangements which have the purpose or effect of, *inter alia*, altering the incidence of income tax, or defeating, evading or avoiding any duty or liability imposed on any person by the Act. Not all tax planning arrangements will stand up to the cold winds of s. 260, and only a few weeks ago the Privy Council in *Newton* v. *Federal Commissioner of Taxation* upheld a decision of the High Court (*F.C. of T.* v. *Newton* (1957), 96 C.L.R. 578) in favour of the Commissioner of Taxation on this very section. Whether the Privy Council decision throws any new light on the operation of s. 260 it is not possible to say until the full judgment is published. However, it is well known that the Taxation Department does not need the benefit of s. 260 to upset sham transactions. What the section has struck at successfully in the past were agreements or arrangements which, though made or entered into with complete legal efficacy, lacked any business reality. They were real in the legal sense but fell foul of the section by reason of their purpose or effect. The purpose or effect must be such that in substance, but not necessarily in form, the position of the taxpayer remains unaltered in a business or economic sense. A change in real ownership, even though made with the object of minimizing or avoiding tax, has never been regarded as voided by s. 260. However, the section should always be borne in mind when examining a client's proposals for re-arrangement of his affairs.

Every client has a different problem and no set plan will be the most effective for all. It is for the practitioner to make a thorough study of his client's affairs and requirements, preferably in consultation with the client's accountant, and advise on the best method according to the circumstances.

From the above it will be seen that it is possible to bring about practically the same result as the old fashioned family settlement despite the income tax and death duty restrictions which present-day revenue legislation imposes. Conveyancing is an ever-changing science and it is for the profession to keep abreast of taxation developments so that, as in the past, we are able to render a proper service to the public.

Since the above paper was written the judgment of the Privy Council in the *Newton Case* has been published. From an examination of the judgment it does not appear that any new interpretation has been placed on s. 260. It is submitted that the decision of the Judicial Committee serves only to confirm and not to extend the view of s. 260 which has been consistently followed by the High Court in *Jacques* v. *F.C. of T.* (1924), 34 C.L.R. 328; *Clarke* v. *F.C. of T.* (1932), 48 C.L.R. 56; and *Bell* v. *F.C. of T.* (1953), 87 C.L.R. 548.

THE MEMORANDUM IN WRITING*

ESSENTIAL CONTENTS

Statutory requirements

Before discussing the subject-matter which must be included in a memorandum in writing if it is to satisfy the requirements of s. 40 of the *Law of Property Act* 1925,† it may be advisable to look at the exact wording of subsection (1) of the section. It runs as follows: "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorized".

That subsection therefore contemplates two entirely separate possibilities; either a contract in writing, or a written document which does not purport to be a contract but which records the terms of an oral agreement. Occasionally there may be some little doubt whether a particular document is a contract or a memorandum. Thus, the document relied on in *Beckett* v. *Nurse,* [1948] 1 All E.R. 81, had features common to both categories. It was in the form of a receipt for a deposit "for a field situate near the Fox Inn. Sold for £50", which bore a twopenny stamp over which the vendor had written his signature and the date, and thus far it appeared to be nothing more than a memorandum evidencing an antecedent oral bargain. However, below the stamp the vendor had signed again, this time adding his address, and below this signature there appeared a sketch plan of the property, an adjunct more appropriate to a contract. In the county court it was held that the document was a contract, but in the Court of Appeal it was held that it was a receipt and memorandum only, the deciding factor being, apparently, that it was signed by one party only.

Inclusion of material terms

When once it has been decided that the document in issue is a memorandum then, turning to the words of the statute, it will be seen that it must be a memorandum "thereof", that is to say a memorandum of the contract previously entered into. That is to say it must contain all the material terms of that contract. Accordingly, in

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* By courtesy of *The Law Journal* England.

†See N.S.W., s. 54A of the *Conveyancing Act* 1919-1954; Vic., s. 128 of the *Instruments Acts;* Qld., s. 5 of *The Statute of Frauds and Limitations of* 1867; S.A., s. 26 of the *Law of Property Act* 1936-1956; W.A., s. 4 of the *Statute of Frauds* (29 Car. 2 c. 3); Tas., s. 36 of the *Conveyancing and Law of Property Act* 1884.

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Johnson v. *Humphrey*, [1946] 1 All E.R. 460, ROXBURGH, J. held that a memorandum was insufficient to satisfy the statute because, although it stated that the balance of the purchase money should be paid on completion, it omitted to state the material term, which had been expressly agreed, that vacant possession was not to be given until the vendor had made suitable arrangements for herself and her furniture. Again, in *Hawkins* v. *Price*, [1947] 1 All E.R. 689, the memorandum which, like that in *Johnson* v. *Humphrey*, was a deposit receipt, was held to be insufficient because it omitted to state the date which had been fixed for completion in the oral agreement between the parties and was, thus, not a complete record of the material terms of that agreement.

Terms implied by law

To the rule that all material terms must be stated there are, however, certain exceptions.

In the first place it is not necessary to state any terms that the law implies. So, where no date is fixed for completion by the oral agreement or for the giving of vacant possession and the law accordingly implies a term that completion is to take place within a reasonable time and a term that vacant possession is to be given on completion, the memorandum will not be defective because it does not state these implied terms. The memorandum in *Johnson* v. *Humphrey* and *Hawkins* v. *Price* would, therefore, have been adequate but for the express term which excluded the implied term.

Likewise, on sale of freeholds the law implies an agreement to sell the fee simple, unless the contrary appears, and accordingly the interest sold need not be mentioned in the memorandum. This has always been assumed to be the law, but direct authority is now to be found in *Timmins* v. *Moreland Street Property Co., Ltd.*, [1957] 3 All E.R. 265. There ROMER, L.J., said: "The memorandum is not insufficient if it omits to mention the particular interest which the vendor is selling in the property, provided that the property itself is sufficiently described. If no interest is mentioned, then prima facie an unencumbered freehold interest will be implied".

In *Timmins* v. *Moreland Street Property Co., Ltd.* the property was in fact subject to a lease for forty-two years of which about thirty-six years were unexpired, but though the word "freehold" was added in brackets after the physical description of the property in the document put forward as a memorandum, no reference to the lease appeared therein. It appeared from the evidence, however, that the purchaser knew of the lease at the time when he entered into the agreement and it was held by the Court

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of Appeal that in these circumstances omission of any reference thereto did not vitiate the memorandum. As to this it is worth quoting JENKINS, L.J., who said: "If it is shown that at the time when the oral contract was entered into the purchaser knew that the interest actually possessed and offered for sale by the vendor was subject to some irremovable incumbrance such as a lease, then the presumption will, *quoad* that incumbrance, be rebutted, and the purchaser will be bound to accept a conveyance subject to that incumbrance as a sufficient performance of the contract. . . . I think that, by virtue of their knowledge at the time of entering into the oral contract that the plaintiff's interest was subject to the lease, the defendant company were precluded by implication of law from objecting to take the property subject to the lease, whether it was or was not described in the memorandum as being so subject".

It further appears from certain *obiter dicta* in the last-mentioned case that tenure need not be referred to in the memorandum even when it is leasehold only, provided always that the purchaser knew its nature at the time of the agreement. JENKINS, L.J., instanced the case of a vendor, negotiating without the aid of a solicitor, showing the purchaser a long lease, saying that was the document under which he held and that he would sell his whole interest thereunder, and continued: "Then if the parties thought it advisable to put the transaction into writing and they did it themselves, and the vendor in consequence signed a memorandum referring simply to 'my house Blackacre' . . . without any reference to tenure, it would, as I think, be a most inconvenient and unfair result, given, of course, the essential element of knowledge on the part of the purchaser that the vendor's interest was leasehold only, that such a memorandum should be held to be insufficient". ROMER, L.J., made the same point in more general terms, when he said that he could not think a memorandum would fail in sufficiency if it omitted an explanation of why the implication of an unencumbered fee simple was displaced, or failed to specify the precise interest the vendor had agreed to sell and the purchaser agreed to buy, or if it made no reference to incumbrances.

Waiver of terms omitted

The question has sometimes arisen whether a memorandum, which fails to state some stipulation of the contract which was wholly for the benefit of the plaintiff, may be treated as sufficient if the plaintiff chooses to waive that stipulation. The better view would appear to be that stated in *Fry on Specific Performance* (6th edn.), p. 243, that he may do so if the stipulation is of no great importance,

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and this was adopted by EVERSHED, J., as he then was, in *Hawkins* v. *Price* (*supra*), where, however, he refused to determine the point at which a term ceases to be of fundamental importance.

On the other hand, it appears from *Burgess* v. *Cox*, [1950] 2 All E.R. 1212, that a plaintiff can never concede a material term favourable to the defendant which has been omitted from the memorandum with a view to making an insufficient memorandum sufficient.

CASE NOTES

Passing Off

Bona fide use by defendants of own name—confusion of defendants' goods with those of the plaintiffs.—The plaintiffs and their predecessors had traded in England as distributors and sellers of watches for some hundred years. Since 1878 the word "Baume" had been the registered trade mark for the watches and the plaintiffs were the registered proprietors of the mark. The defendants began to sell watches made by a Swiss company known as Baume & Mercier S.A. The watches and the boxes containing them bore the mark "Baume & Mercier Genève". The plaintiffs claimed that this use of the word "Baume" constituted an infringement of their trade mark and was calculated to pass off the goods sold by the defendants as the plaintiffs' goods. The defendants established that this use was an honest use by them of the makers' own name. It was held that this use constituted a passing off which should be restrained by injunction because (a) there was real probability that the watches marked "Baume & Mercier Genève" would be regarded as being the same as or in some way associated with the plaintiffs' goods and (b) no man was entitled, even by the honest use of his own name so to describe or mark his goods as in fact to represent that they were the goods of another person (*Baume & Co. Ltd.* v. *A. H. Moore Ltd.*, [1958] 2 All E.R. 113).

Restraint of Trade

Agreement by companies not to employ persons employed by the other within previous five years—reasonableness—restriction on employees' freedom of choice of employment. —The decision of LLOYD-JACOB, J. in *Kores Manufacturing Co. Ltd.* v. *Kolok Manufacturing Co. Ltd.*, [1957] 3 All E.R. 158 (reported on p. 159 of Vol. 10 of this Journal) was affirmed by the Court of Appeal, [1958] 2 All E.R. 65.

[Opinions expressed by the writers of contributed articles are not necessarily those of this Journal.]

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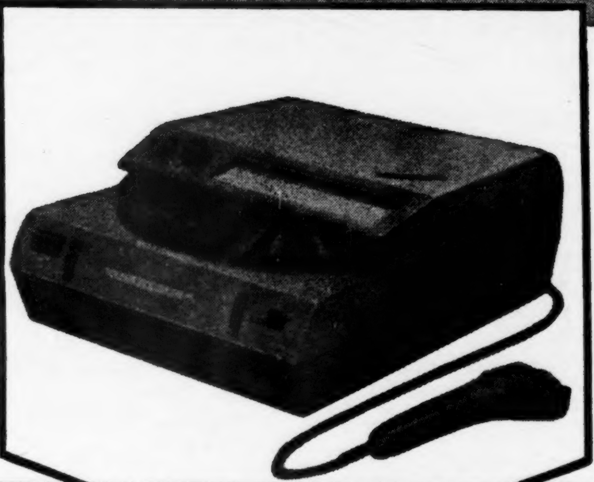

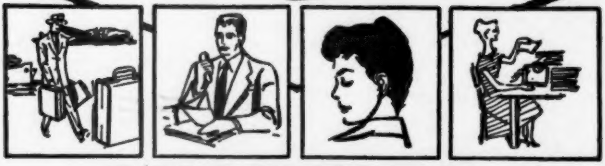

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